88-517

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE CITY OF GALVESTON, TEXAS, acting by and through THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES, and GALVESTON RAILWAY, INC.,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TCU, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, TRANSPORTATION COMMUNICATIONS UNION, UNITED TRANSPORTATION UNION, YARDMASTERS DEPARTMENT and UNITED TRANSPORTATION UNION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Date: September 23, 1988

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QUESTION PRESENTED

Where an ICC Order has already approved the sale/lease of a railroad, would a status quo injunction preventing the consummation of the sale/lease pending the exhaustion of Railway Labor Act procedures constitute an impermissible collateral attack on that Order of the ICC?

RULE 28.1 LISTING

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, Petitioners the City of Galveston, Texas, acting by and through the Board of Trustees of the Galveston Wharves, and Galveston Railway, Inc., list the following parent companies, subsidiaries, and affiliates:

Wilmington Terminal Railroad, Inc.
Rail Management & Consulting Corp.
Grizzard Transfer, Inc.
ATW Corp.
Rail Switching Services, Inc.
Durden, Inc.
East Tennessee Railway, Inc.
KWT Railway, Inc.
Copper Basin Railway, Inc.

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THE CITY OF GALVESTON, TEXAS, acting by and through THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES, and GALVESTON RAILWAY, INC.,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TCU, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, TRANSPORTATION COMMUNICATIONS UNION, UNITED TRANSPORTATION UNION, YARDMASTERS DEPARTMENT and UNITED TRANSPORTATION UNION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, the City of Galveston, acting by and through the Board of Trustees of the Galveston Wharves (hereinafter referred to as "Galveston Wharves" or "Wharves"), and Galveston Railway, Inc. (hereinafter referred to as "GRI") respectfully request that this Honorable Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the opinion of that Court which was entered on June 23, 1988, in *Railway Labor Executives Association v. The City of Galveston, Texas.*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 849 F.2d 145 and is reprinted in the Appendix hereto at App. A. The District Court's Findings of Fact and Conclusions of Law and Supplemental Findings of Fact are reported at 685 F. Supp. 158 and are reprinted in the Appendix hereto at App. B and C.

JURISDICTION

The opinion of the Fifth Circuit was entered on June 23, 1988. The Petitioners have not sought rehearing, but by Order dated September 17, 1988, were granted an extension of time to October 21, 1988 within which to file this petition for writ of certiorari. The Petitioners seek to invoke this Honorable Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves Section 6 of the Railway Labor Act, 45 U.S.C. § 156 and Sections 10505 and 10901 of the Interstate Commerce Act, 49 U.S.C. §§ 10505 and 10901. These statutory provisions are reprinted in the Appendix attached hereto at App. D. This case also involves the Interstate Commerce Commission regulations governing ICC authorization of transactions such as the sale/lease at issue in this case. 49 C.F.R. § 1150, Subpart D. These regulations are reprinted in the Appendix attached as App. E.

STATEMENT OF THE CASE

After suffering severe economic losses during 1985 and 1986, and having failed during 1987 to improve its

financial condition by obtaining wage and work rule concessions from its railroad unions or otherwise, the Galveston Wharves engaged the services of an investment consultant. The consultant was hired for the purpose of assisting the Wharves in locating an investor or investors who might be willing to assist the Wharves in meeting its municipal and other debt obligations. After reviewing the Wharves' financial picture, the consultant concluded that no reasonable investor would be willing to lend monies to the Wharves or otherwise guarantee the Wharves' existing debt without some substantial improvement in the Wharves' cash flow. It was concluded that in order to improve the Wharves' cash flow, the sale of some asset or assets would be necessary. A determination was made that the Wharves' railroad was a valuable asset for which there might be a willing buyer. On September 29, 1987, the Wharves' Board of Trustees was presented a proposal to consider selling its railroad assets and leasing the railroad realty to GRI. During the Board's meeting on September 29, 1987, the Board offered to allow its railroad unions to consider taking a 26.4% wage reduction as an alternative to the sale/lease of the railroad. On October 20, 1987, the rail unions advised the Wharves' Board of their decision to reject any wage concession. The Wharves' Board then voted to enter into the sale/lease agreement with GRI.

On that date, the sale/lease agreement was signed and GRI filed a notice with the ICC under the Commission's exempt transaction regulations seeking approval of the acquisition of the Wharves' railroad. 49 C.F.R. § 1150.31 *et seq*. Under these regulations, the exemption would have been effective seven days after the filing of the notice with the ICC. See App. E.

Prior to the effective date of the ICC's exemption, the Railway Labor Executives' Association (hereinafter referred to as "RLEA") and several of its constituents filed suit in the United States District Court for the Southern District of Texas, Galveston Division, alleging that the proposed sale/lease would violate Section 6 of the Railway Labor Act, 45 U.S.C. § 156.[1] In its suit, RLEA sought a status quo injunction prohibiting the consummation of the sale/lease agreement pending the exhaustion of the procedures contained in Section 6 of the RLA. Significantly, RLEA, while asserting that the Wharves' proposed actions if allowed to take place would violate Section 6 and that the Wharves should be enjoined to comply with Section 6, urged that by reason of certain national standby agreements, the Wharves would be prohibited from attempting to invoke the Section 6 procedures (if applicable) until April 1, 1988. Thus, RLEA sought to preclude the Wharves from effectuating its decision to dispose of its railroad and to require the Wharves to bargain over its decision with the requisite that the Wharves wait until April 1, 1988, before serving any notice of its intention to engage in bargaining.

On November 4, 1987, the District Court, relying upon *Railway Labor Executives' Association v. Staten Island R.R.*, 792 F.2d 7 (2nd Cir. 1986), *cert. denied*, 107 S. Ct. 927 (1987), denied RLEA's application for injunctive relief on the basis that any injunction would constitute an impermissible collateral attack on the order of the ICC approving the proposed sale/lease of the Wharves' railroad. See App. B. Following the District

1. RLEA's Complaint for Declaratory and Injunctive Relief is reprinted in the Appendix hereto at App. F.

Court's decision, on November 5, 1987, the proposed sale/lease between the Wharves and GRI was consummated.

On appeal, the appellant, RLEA, argued not only for a reversal of the District Court's decision denying the request for preliminary injunctive relief but also for a determination by the Court of Appeals that the Wharves' sale/lease of its railroad facilities to GRI violated the RLA. In its decision, the Court of Appeals first determined that the District Court was correct in its determination that the Wharves' rail facilities was a "railroad line" within the meaning of 49 U.S.C. § 10901 for purposes of the ICC's jurisdiction to authorize the sale/lease. *RLEA v. City of Galveston, Texas,* 849 F.2d 145, 148-149 (5th Cir. 1988), App. A at 7a-9a.[2] The Court of Appeals did, however, reverse and remand the District Court's order denying preliminary injunctive relief relying exclusively upon the reasoning of the Third Circuit Court of Appeals in *Railway Labor Executives' Association v. Pittsburgh & Lake Erie Railroad Co.,* 845 F.2d 420 (3rd Cir. 1988), *pet. for cert. pending,* Sup. Ct. No. 87-1888 (hereinafter referred to as "P&LE II"). The Fifth Circuit adopted the arguably questionable reasoning of the majority in the strongly divided Third Circuit opinion in distinguishing the Second Circuit's decision in *Staten Island.* 849 F.2d at 149-150, App. A at 10a-12a. While further recognizing that its decision was contrary to the decision by the Eighth Circuit in *Railway Labor Executives' Association v. Chicago & Northwestern Transportation Co.,* 848 F.2d 102 (8th Cir.

2. For purposes of this petition, it should be noted that the Petitioners are not seeking review of this portion of the opinion by the Court of Appeals.

1988), *pet. for cert. pending,* Sup. Ct. No. 87-2049, the Fifth Circuit simply adopted the views of the Third Circuit in P&LE II in holding that a status quo injunction issued to enforce the Railway Labor Act "would not impermissibly contravene" the ICC's approval of the sale/lease. 849 F.2d at 146, 152, App. A. at 2a-3a, 16a.[3]

REASONS FOR GRANTING THE WRIT

This Case Presents An Issue Decided In Conflict With At Least Two Other Federal Courts Of Appeals As Well As An Applicable Decision Of This Court.

In *Railway Labor Executives' Association v. Chicago & Northwestern Transportation Co.,* 848 F.2d 102 (8th Cir. 1988), *pet. for cert. pending,* Sup. Ct. No. 87-2049, the Eighth Circuit was faced with an appeal involving facts similar to those in this case. Utilizing procedures adopted by the ICC in *Ex Parte No. 392 (Sub. No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901,* 1 I.C.C. 2d 810 (1985), *review denied sub nom. Illinois Commerce Commission v. ICC,* 817 F.2d 145 (D.C. Cir. 1987) ("*Ex Parte No. 392*"), now codified at 49 C.F.R. § 1150.31 et seq.,[4] Chicago & Northwestern Transportation Company (C&NW) sought to sell a portion of its rail line

3. Though the Fifth Circuit reversed the judgment of the District Court denying a preliminary injunction, the Circuit expressly pretermitted the question whether the Wharves' actions violated the RLA.

4. In *Ex Parte No. 392,* the ICC utilized the exemption provisions in 49 U.S.C. § 10505 to exempt as a class "new carriers" from the prior approval requirements in 49 U.S.C. § 10901 regarding the acquisition of rail lines. Both the transaction in this case as well the the transaction involved in *Chicago & Northwestern Transportation Co.* were Section 10901 transactions.

to Dakota, Minnesota & Eastern Railroad (DM&E). After a verified notice had been filed with the ICC pursuant to *Ex Parte No. 392,* RLEA filed suit in the United States District Court for the District of Minnesota seeking a declaratory judgment that C&NW was obligated under the RLA to bargain over the proposed sale of its rail line and sought an injunction maintaining the status quo until the RLA bargaining procedures had been concluded. The District Court denied RLEA's application for preliminary injunction noting that the requested relief would contravene the decision of the ICC approving the sale. The Eighth Circuit, relying upon its decision in *Burlington Northern Railroad v. United Transportation Union,* 848 F.2d 856 (8th Cir. 1988), held that the provisions of the Interstate Commerce Act, 49 U.S.C. § 10101 et. seq. superceded the mandatory bargaining provisions of the RLA and that the requested injunctive relief could not issue. *Chicago & Northwestern Transportation Co.,* 848 F.2d at 104. Of significant note, the Eighth Circuit, in *Burlington Northern,* relied upon the Second Circuit's decision in *Staten Island* in concluding that the Interstate Commerce Act's provisions regarding rail acquisitions supercede the mandatory bargaining provisions under the RLA. *Burlington Northern,* 848 F.2d at 863.

In *Staten Island,* the Second Circuit similarly denied a district court's denial of injunctive relief to RLEA. RLEA had sought to enjoin Staten Island Railroad Corporation ("SIRC") from selling its rail line to Staten Island Railway Corporation ("SIRY"). The sale had been approved under 49 U.S.C. § 10905. The application for approval of the sale had been made after the ICC

had approved SIRC's prior application to abandon under 49 U.S.C. § 10903. After the ICC had approved the sale to SIRY, RLEA commenced an action alleging that the sale would violate Section 6 of the RLA and sought declaratory and injunctive relief seeking to maintain the status quo pending the exhaustion of Section 6 procedures. The District Court denied RLEA's requested injunction reasoning that since the requested relief would impinge upon the ICC's order approving the sale, it would constitute an impermissible collateral attack upon such order. On appeal, the Second Circuit, while finding that the District Court had jurisdiction over RLEA's suit, affirmed the District Court's denial of injunctive relief agreeing that such relief would impinge upon the ICC's order approving the sale. *Staten Island,* 792 F.2d at 12.

As noted above, the Fifth Circuit expressly rejected the analysis of the Eighth Circuit in *Chicago & Northwestern Transportation Co.,* 849 F.2d at 152, App. A at 16a. Similarly, the Fifth Circuit adopted verbatim the Third Circuit's strained attempt in *P&LE II* to distinguish *Staten Island.* 849 F.2d at 150, App. A at 12a. In this regard, the Third Circuit in *P&LE II* attempted to distinguish *Staten Island* by utilizing the illusory device of differentiating between a mandatory and permissive order of the ICC. The Third Circuit noted that the order in *Staten Island* was a mandatory order pursuant to Section 10905 and that an order under Section 10901 would be merely permissive. The Third Circuit reasoned that the status quo injunction mandating exhaustion of the Section 6 procedures of the RLA as requested in *Staten Island* would constitute a collateral attack on the ICC's order since such order was mandatory. *P&LE II,* 845

F.2d at 438 n.27, *accord The City of Galveston,* 849 F.2d at 150, App. A at 12a.[5]

In an additional effort to avoid the Second Circuit's reasoning in *Staten Island,* the Third Circuit resorted to further illogical reasoning in order to avoid the impact of this Court's decision in *Venner v. Michigan Central Railroad Co.,* 271 U.S. 127 (1926). In *Venner,* this Court held quite clearly that where an order of the ICC is being assailed, it makes no difference whether the order is mandatory or permissive, 271 U.S. at 131. Rejecting this clear holding, the Third Circuit (and the Fifth Circuit in adopting the Third Circuit's views) simply dismissed *Venner* as inapposite because the requested injunctive relief involved would have permanently blocked the transaction approved by the ICC as opposed to merely delaying it. *P&LE II,* 845 F.2d at 438 n.27, *accord The City of Galveston,* 849 F.2d at 150, App. A at 12a.

Clearly, the Third Circuit's reasoning, as adopted by the Fifth Circuit, is weak at best. Even without applying this Court's holding in *Venner,* the Third Circuit's attempted effort to distinguish *Staten Island* fails. In *Staten Island,* the ICC's order under Section 10905 approving the sale in question stated that SIRC "must complete the sale so long as the buyer consummates." *Staten Island,* 792 F.2d at 11. In this case, as in *P&LE II,* the ICC's approval of the proposed acquisition under Section 10901 though characterized as "permissive" is just as "mandatory" as that order involved in *Staten Island.* That is, once the agreement for the sale of the railroad had been reached between seller and buyer, and the ICC had ap-

5. Interestingly, in *Staten Island,* the Second Circuit rejected RLEA's attempt to rely upon the permissive/mandatory distinction. *Staten Island,* 792 F.2d at 12.

proved the proposed acquisition, the seller (Galveston Wharves in this case) was obligated to "complete the sale so long as the buyer [GRI] consummates."[6] Obviously, the distinction between permissive and mandatory orders when used as a basis for distinguishing *Staten Island* is fallacious.

Even without this abortive distinction, the Third Circuit's analysis adopted by the Fifth Circuit cannot stand in light of the clear and irrefutable holding by this Court in *Venner*. Attempting to dismiss *Venner* on the simple ground that the attack upon the ICC's order would have blocked the transaction approved by the order rather than merely delaying it creates a direct conflict with the holding in *Venner*. *Venner* can only be read one way: where an ICC order is subjected to collateral attack, it makes no difference whether the order is permissive or mandatory.

Accordingly, the Fifth Circuit was clearly in error in reversing the District Court below. The judgment of the District Court was correct in that the requested preliminary injunctive relief would constitute an impermissible collateral attack upon the ICC's approval of the sale/lease of Galveston Wharves' railroad to GRI.[7]

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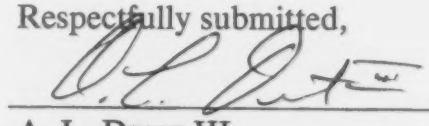
6. In *Staten Island*, the Second Circuit viewed the ICC's order in that case in the identical manner. *Staten Island*, 792 F.2d at 12.

7. It almost goes without saying that this case presents an issue which involves an important question of federal law which should be settled by this Court. As the Petitioner in *P&LE II* has correctly stated in its Petition for Writ of Certiorari, the Third Circuit's decision in *P&LE II*, and now, the Fifth Circuit's decision in this case, will have an enormous impact upon the railroad industry. If every ICC-approved Section 10901 transaction can be frustrated by rail labor's uninhibited use of the RLA as both a sword and shield, then the ICC's authority to approve such transactions is rendered impotent, and the railroad industry becomes a hostage in a manner neither contemplated nor intended by Congress.

CONCLUSION

For the above reasons, Galveston Wharves and GRI respectfully request that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review and reverse the judgment of that Court.

Respectfully submitted,



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Dated: September 23, 1988

APPENDIX A

RAILWAY LABOR EXECUTIVES ASSOCIATION, et al.,
Plaintiffs-Appellants,

v.

The CITY OF GALVESTON, TEXAS, acting By and Through The BOARD of TRUSTEES of the GALVESTON WHARVES, Defendants-Appellees.

No. 87-6169.

United States Court of Appeals,
Fifth Circuit.

June 23, 1988.

Union association representing railroad employees sought to enjoin sale of railroad assets and lease of terminal road facilities based on failure to comply with Railway Labor Act. The United States District Court for the Southern District of Texas, Hugh Gibson, J., denied preliminary injunction, and appeal followed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) sale and lease of assets and terminal facilities was within jurisdiction of Interstate Commerce Commission, and (2) Staggers Act, which permitted ICC to exempt rail transactions from approval process, did not implicitly repeal Railway Labor Act requirement that railroad bargain with union over consequences of sale and lease.

Reversed and remanded.

William J. Birney, Highway & Mahoney, Washington, D.C., for plaintiffs-appellants.

Ralph J. Moore, Jr., Shea & Gardner, Washington, D.C., for amicus curiae: National Ry. Labor Conference.

Dick Dent, Fulbright & Jaworski, Houston, Tex., McLeod, Alexander, Powel & Apffel, Benjamin R. Powel, Galveston, Tex., for City of Galveston, Texas.

Slover & Loftus, Kelvin J. Dowd, Donald G. Avery, Washington, D.C., for Galveston Ry.

Appeal from the United States District Court for the Southern District of Texas.

Before RUBIN and POLITZ, Circuit Judges, and DUHE,* District Judge.

ALVIN B. RUBIN, Circuit Judge:

Faced with operating losses, the port of Galveston, Texas, decided to sell its railroad assets and lease its railroad terminal facilities to a newly-formed rail company. The Interstate Commerce Commission, acting under a procedure authorized by the Staggers Act of 1980, gave expedited approval to the sale/lease without imposing conditions to protect railway workers at the port. Executives of the unions representing the workers, however, sued to enjoin the transaction until Galveston had bargained over its effects as mandated by the Railway Labor Act of 1926. The district court refused to grant a preliminary injunction because such an order would impermissibly attack the ICC's approval of the transaction, 685 F.Supp. 607 [sic]. Following the lead of the Court of

* District Judge of the Western District of Louisiana, sitting by designation.

Appeals for the Third Circuit in *Railway Labor Executives Association v. Pittsburgh & Lake Erie Railroad Co.*,[1] we hold that the injunction would not impermissibly contravene the Commission's approval and that the deregulatory provisions of the Staggers Act do not implicitly repeal the protections afforded workers in this context by the Railway Labor Act. We therefore reverse and remand for the district court to determine whether the Railway Labor Act requires that the injunction be issued.

I.

Galveston Wharves consists of extensive wharves and terminal facilities owned by the City of Galveston, Texas, and located at the entrance to Galveston Bay. Pursuant to Galveston's city charter, these operations are managed by the Wharves' Board of Trustees. For many years, Galveston Wharves has owned and operated a terminal railroad that runs five locomotives over 38 miles of track and employs about 85 persons. Galveston Wharves has a collective bargaining agreement with each of the railway labor organizations representing the various crafts and classes of railroad workers employed by it.

In 1985 and 1986, Galveston Wharves suffered economic losses that imposed a severe strain on its financial resources. Consequently, in March 1987 its management opened discussions with the unions in an effort to obtain substantial wage and work-rule concessions. The discussions ended in May, without agreement.

After consultation with an investment banking firm, Galveston Wharves proposed to sell all of its railroad

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1. 845 F.2d 420 (3d Cir. 1988), *pet. for cert. filed*, 56 U.S.L.W. 3839 (May 17, 1988).

assets and to lease its terminal railroad facilities to a new firm, Galveston Railway, Inc. (GRI). On September 29, 1987, Galveston Wharves announced that it would proceed with these transactions unless the unions agreed to accept a 26.4 percent reduction in existing wages and benefits, a figure the investment firm had calculated would be necessary to achieve the same savings afforded by the lease agreement.

A month later, after the unions refused to make the concessions, Galveston Wharves' Board approved the documents required for the transactions. The lease, which runs for a term of 10 years, states that GRI will provide switching services at the Port of Galveston in accordance with Galveston Wharves' existing tariffs and contracts. Galveston Wharves reserves the right to manage and inspect the facilities and to approve in advance any changes in the tariffs.

On the same day, October 20, GRI filed a notice of exemption with the Interstate Commerce Commission, seeking an exemption from the provisions of § 10901 of the Interstate Commerce Act,[2] a section requiring a newly formed carrier that seeks to lease and operate an existing rail line to obtain prior approval of the Commission. GRI invoked the Commission's authority under § 10505 of the Act[3] to exempt a transaction from the requirements of § 10901.

In 1985, pursuant to this authority, the ICC in *Ex Parte No. 392*[4] had adopted a class exemption for sub-

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2. 49 U.S.C. § 10901.

3. 49 U.S.C. § 10505.

4. Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901, 1 I.C.C.2d 810 (1985), *review denied as Illinois Commerce Com'n v. I.C.C.*, 817 F.2d 145 (D.C. Cir. 1987).

stantially all § 10901 acquisitions and operations. Under the class exemption, such transactions automatically become effective seven days after notice is filed with the Commission unless a petition to revoke the exemption has been filed and granted or the Commission stays the transaction.[5] The Commission decline to impose employee-protective conditions on this class of transactions on the ground that [e]mployee protection "would discourage acquisitions and operations that should be encouraged" in order to eliminate lines that cannot operate economically.[6] The Commission stated that it was prepared to impose labor protection only in an "extraordinary case."[7]

After the ICC's approval of the sale/lease became effective, this suit was promptly filed by the Railway Labor Executives Association, an unincorporated association of the chief executive officers of the 19 labor organizations that collectively rerpresent all of the organized railroad employees at Galveston Wharves as well as most of the organized rail employees in the United States. The Association contended that the sale/lease and Galveston Wharves' abrogation of its collective bargaining agreements with the unions constituted unilateral changes in existing agreements in violation of the Railway Labor Act,[8] which prohibits an employer from making unilateral changes in its employees' rates of pay, rules, and working conditions while the parties are complying with the Act's mandatory bargaining requirements.[9] The Association

5. *Id.* at 816-17.

6. *Id.* at 813.

7. *Id.* at 815.

8. 45 U.S.C. §§ 151-188.

9. 45 U.S.C. § 152 Seventh, § 156.

sought to enjoin Galveston Wharves from leasing the facilities and "from abrogating its collective bargaining agreements in violation of the mandatory requirements of the Railway Labor Act."

The district court issued a temporary restraining order prohibiting the transfer, but, after a hearing, the court dissolved the order on November 4. The court found that the sale or lease of the railroad property required authorization by the ICC; the Commission had approved the transaction; issuance of the injunction would forestall consummation of the sale and lease; and such an injunction would contravene and constitute an impermissible collateral attack on the order of the Commission. Under 28 U.S.C. §§ 2321 and 2342, the courts of appeals have exclusive jurisdiction to review ICC orders. The district court did not therefore reach the question whether Galveston Wharves had violated the Railway Labor Act.

The day after the district court's order, Galveston Wharves and GRI consummated the agreement, and Galveston Wharves discharged all of its railroad operating employees.

On appeal, we remanded to the district court for it to enter a statement of the factual bases on which it had concluded the facilities were rail lines subject to ICC jurisdiction. The district court having entered those findings, the case was resubmitted to this panel on the briefs originally filed and on letter briefs discussing the district court's supplemental findings of fact.

II.

The decision to grant or deny preliminary, as opposed to ultimate, relief involves a measure of discretion to be

exercised by the district judge, and we will reverse only for abuse of discretion.[10] In reviewing the findings underlying the decision to grant or deny relief, however, we make the familiar distinction between factual determinations and legal conclusions, accepting the former unless they are clearly erroneous but exercising independent judgment concerning the latter.[11]

III.

[1] The parties first dispute whether the ICC had jurisdiction over the Galveston facilities so as to authorize their sale and lease. The Interstate Commerce Act gives the Commission jurisdiction to approve and regulate acquisitions of "railroad line[s]" but exempts "spur, industrial, team, switching, or side tracks" located within a single state.[12] Whether a section of track is a rail line or a switching or spur track is a mixed question of law and fact on which we exercise independent review,[13] but the underlying facts found by the district court must be accepted, under Fed. R. Civ. P. 52(a), unless they are clearly erroneous.[14]

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10. *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974) (*cited in Mississippi Power & Light v. United Gas Pipe Line*, 760 F.2d 618, 621 (5th Cir. 1985)).

11. *Gearhart Industries, Inc. v. Smith International, Inc.*, 741 F.2d 707, 710 (5th Cir. 1984); *Apple Barrel Productions, Inc.*, 730 F.2d 384, 386 (5th Cir. 1984); *see also In re Fredeman Litigation*, 843 F.2d 821, 824 (5th Cir. 1988).

12. 49 U.S.C. §§ 10901, 10907(b).

13. *Compare New Orleans Terminal Company v. Spencer*, 366 F.2d 160, 164 (5th Cir. 1966); *Illinois Commerce Com'n v. United States*, 779 F.2d 1270, 1271 (D.C. Cir. 1985).

14. *See also Georgia Southern & Fla. Ry. Co. v. Duval Connecting R. Co.*, 324 F.2d 801, 802 (5th Cir. 1963).

[2] Whether a track is a rail line or switching or spur track turns on its use and intended use. As we declared in *New Orleans Terminal Company v. Spencer:*

> If there are traffic movements which are part of the actual transportation haul from shipper to consignee, then the trackage over which the movement takes place is a "line of railroad, or extension thereof." . . . If, however, the trackage is used in the loading, reloading, storage and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage is "spur, industrial, team, switching or side tracks" and as such, not under Commission jurisdiction.[15]

[3] On remand from our previous order, the district court found that these rail facilities provide for the transportation of cargo between line-haul rail carriers and seagoing vessels engaged in interstate and foreign commerce and that they perform a function that is an integral and vital part of the through movement of goods in such commerce. The court found that the railroad serves as the agent for line-haul railroads and its charges are absorbed by the line-haul carriers. While this function is sometimes called "switching," it is not merely incidental to train movement; it is, the court found, "a necessary link in the transportation under the through bill of lading"[16] and hence "part of the actual transportation haul from shipper to consignee."[17] The district court concluded

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15. *New Orleans Terminal Company,* 366 F.2d at 165-66; *see also Nicholson v. I.C.C.,* 711 F.2d 364, 367 (D.C. Cir. 1983).

16. *See Galveston Wharf Co. v. Galveston, Harrisburg & San Antonio Railway Co.,* 285 U.S. 127, 134, 52 S. Ct. 342, 344, 76 L.Ed. 659 (1932).

17. *New Orleans Terminal Company,* 366 F.2d at 166.

that, therefore, the line is a "rail line" and not a "spur track" or "switching track."

We accept the district court's findings of fact, for they are not clearly erroneous, and agree with its conclusion that the track in question is part of the actual transportation haul and is therefore a railroad line. The Commission had jurisdiction to approve the sale/lease.

IV.

After we had heard oral argument, the Court of Appeals for the Third Circuit decided *Railway Labor Executives Association v. Pittsburgh & Lake Erie Railroad Co.*,[18] in which it considered each of the issues presented in this case. That opinion gives the history of the Railway Labor Act of 1926[19] and of the Interstate Commerce Act as amended by the Railroad Revitalization and Regulatory Reform Act of 1976[20] and, particularly, the Staggers Act of 1980.[21] In a thorough 60-page opinion, Judge Edward Becker reviewed the identical arguments made before us and held that the statutes amending the Interstate Commerce Act did not implicitly repeal the Railway Labor Act and did not authorize the ICC to exempt the sale of a railroad from the provisions of the RLA. In a discerning 10-page dissent, Judge William Hutchinson adopted a contrary view.

As the majority opinion in *Pittsburgh & Lake Erie Railroad* points out, the Railway Labor Act and the

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18. 845 F.2d 420 (3d Cir. 1988).

19. 45 U.S.C. §§ 151-188.

20. Pub. L. No. 94-210, 90 Stat. 31.

21. Pub. L. No. 96-448, 94 Stat. 1895, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978, 3998.

Interstate Commerce Act as amended by the Staggers Act reflect two different sets of congressional policies and therefore make uncomfortable bedfellows. The Staggers Act evinces a concern "to eliminate the imposition of costly government-imposed conditions on otherwise efficient transactions, and, perhaps most importantly, to expedite the approval process so that efficient transactions are not derailed by regulatory red tape."[22] As part of the Staggers Act, Congress in 49 U.S.C. § 10505 granted the ICC broad authority to exempt rail transactions from the approval process, and the Commission has implemented this policy by the class exemption it granted to such transactions in *Ex Parte 392*.

The Railway Labor Act, on the other hand, "is expressly designed to delay certain management decisions, in order to give rail labor more leverage."[23] Such leverage includes the power of labor to obtain an injunction in federal court ordering management to maintain the status quo until the two sides have exhausted the extensive bargaining and mediation processes described in the Act.[24]

In the case before us, the district court concluded, citing the Second Circuit's decision in *Railway Labor Executives Association v. Staten Island R.R.*,[25] that to issue an injunction staying consummation of the sale/lease would constitute an impermissible collateral attack on the order of the ICC that authorized the transaction.

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22. *Pittsburgh & Lake Erie Railroad*, 845 F.2d at 436.

23. *Id.* at 436.

24. *See* 45 U.S.C. § 156; *Detroit & Toledo S.L. R. Co. v. United Transportation Union*, 396 U.S. 142, 149-51, 90 S. Ct. 294, 299-300, 24 L.Ed.2d 325 (1969).

25. 792 F.2d 7 (2d Cir. 1986).

Under 28 U.S.C. §§ 2321 and 2342, the courts of appeals have exclusive jurisdiction to review Commission orders.[26]

The Third Circuit in *Pittsburgh & Lake Erie Railroad* addressed this argument, rejecting it for two reasons that are fully applicable to this case:

> [First, t]he ICC approved this proposed sale under § 10901, which says that a transaction "*may*" proceed given a finding that the public interest "require[s] *or permit*[*s*]" the acquisition, 49 U.S.C. § 10901(a) (emphasis added). Thus, the ICC has made no finding that the public interest *requires* this transaction, that the transaction *must* proceed, or that a delay in (or even collapse of) the transaction would *harm* the public interest. Therefore, the district court's injunction does not conflict with the public interest as determined by the ICC's order, because the injunction merely granted a *delay* in the transaction, and the possibility that labor might win some protection for itself at the bargaining table.
>
> . . . .
>
> [Second,] the ICC merely refused to *impose* labor protective conditions on the transaction. . . . [T]he status quo injunction [would] not require any substantive protection for labor; it merely requires that the parties bargain, a process which may well produce no substantive agreement. . . . [B]argained-for concessions may be substantially less burdensome to the railroad than the typical substantive conditions imposed by the Commission. Put differently, the enforcement of the union's procedural rights should not be viewed as an attack on the ICC's determination that burdensome substantive protections would be detrimental to the public interest.[27]

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26. *Id.* at 12.

27. *Pittsburgh & Lake Erie Railroad*, 845 F.2d at 437, 440 (footnotes omitted).

The Third Circuit specifically considered the Second Circuit's decision in *Staten Island R.R.* and distinguished it as follows:

> The sale of the Staten Island Railroad was approved pursuant to § 10905, rather than § 10901. Section 10905 is a forced sale provision, requiring a financially ailing railroad to sell its assets to a financially responsible purchaser, as an alternative to abandonment of the line under § 10903. The ICC order in that case therefore stated that the seller *"must* complete the sale so long as the buyer consummates." 792 F.2d at 11 (emphasis added). The court therefore held that an injunction against sale could not be granted "without re[s]cission or modification of the ICC's order" . . .; such an attack, of course, would only be appropriate on direct appeal from the ICC order.
>
> P & LE argues [as do amici in this case] that the distinction between a mandatory and permissive ICC order has been rejected by the Supreme Court in *Venner v. Michigan Cent. R.R. Co.,* 271 U.S. 127 [46 S. Ct. 444, 70 L.Ed. 868] (1926). . . . The case, however, is inapposite, both because the requested injunction truly would have blocked the approved transaction as violative of state law, as opposed to merely delaying the transaction pending the exhaustion of bargaining, and because the case, at bottom, was a federal preemption case, declaring that *state* law could not be used to undermine a transaction once a federal law has preempted the field and a federal agency has passed on the very same issues.[28]

[4] We adopt these views, recognizing, as did the Third Circuit, that a long delay occasioned by the RLA's

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28. *Id.* at 438 n. 27 (some citations omitted).

bargaining process "could effectively kill the proposed transaction and ultimately push the railroad into a bankruptcy proceeding,"[29] to the benefit of neither Galveston nor the unions and in derogation of both congressional intent and the ICC order. Because, however, "Congress has not updated . . . the RLA to keep it in tune with newer policies," to disallow the unions from seeking the injunction would effectively abrogate the RLA in this situation, since the Commission is not authorized to order the parties to commence RLA bargaining procedures and since labor protection is only one of fifteen factors the Commission is directed to consider in setting transportation policy.[30]

Like the Third Circuit, we cannot conclude that the Staggers Act "preempts"—that is, implicitly repeals—the RLA in this context. The Supreme Court has recently reemphasized that repeals by implication are disfavored and "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[31] Again we adopt the Third Circuit's detailed discussion of this issue, which the court summarized as follows:

> Dominating our thinking, however, is a reluctance to impinge on a congressional statutory mandate (the RLA) without a clear congressional authorization (and we find none), or to find an implied repeal of the requirements of the venerable Railway

29. *Id.* at 438.

30. *Id.* at 441-42; *see* 49 U.S.C. § 10101a.

31. *Traynor v. Turnage*, ____U.S.____, 108 S. Ct. 1372, 1381, 99 L.Ed.2d 618 (1988) (*quoting Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 2483, 41 L.Ed.2d 290 (1974)).

> Labor Act without an unavoidable conflict between the mandates of the two statutes (and such a conflict is not ineluctable). See *Watt v. Alaska,* 451 U.S. 259, 266-67 [101 S. Ct. 1673, 1677-78, 68 L.Ed.2d 80] (1981). We are particularly reluctant to find such a repeal here, where Congress has so recently addressed itself to deregulating the rail industry, yet has not chosen to relieve management of any of the onerous burdens imposed by the RLA. Moreover, because the Commission's approval of the transaction was merely permissive, we do not view an injunction against the sale as an attack on the ICC's order; and because the approval stemmed from a process in which labor's interests are only one of fifteen factors considered by the Commission, we do not believe that Congress intended that rail labor rely solely on the ICC for protection, to the exclusion of labor's rights under the RLA. For these reasons, we conclude that Congress did not intend the Commission's approval of the transaction without the imposition of substantive labor protective conditions to relieve the railroad of its obligation to comply with the exclusive congressionally-mandated RLA dispute resolution procedures.[32]

The Third Circuit's opinion then concludes:

> We are fully aware of the unfortunate ramifications and irony of our decision. A bargaining order, and a status quo injunction, designed to foster conciliation, promote labor peace, and ultimately keep the rails running, may ultimately have the perverse effect of destroying the only chance [the Railroad] has for survival and perhaps even the very jobs that the unions are now trying to protect. Although we are not happy with this result, we feel constrained to reach it, because the Supreme Court has appro-

32. *Pittsburgh & Lake Erie Railroad,* 845 F.2d at 423.

priately admonished the judiciary not to apply its own brand of "common sense" in the face of a contrary statutory mandate. *See TVA v. Hill*, 437 U.S. 153, 193-95 [98 S. Ct. 2279, 2301-02, 57 L.Ed.2d 117] (1978).

We recognize, of course, that the statutory mandate is in tension with more recent congressional policies. However, we do not feel free to translate those abstract policies into a repeal of a black-letter law. If we have misinterpreted congressional intent, we can only hope that Congress speaks more clearly and consistently quite soon.

We nevertheless will urge the National Mediation Board, to the extent it is within the Board's powers, to minimize the burden on the railroad, if possible. The Board's ultimate goal, of course, should be to promote conciliation and possibly agreement. Naturally, as long as this continues to be a reasonable possibility, the Board should conduct itself in the usual manner and refrain from releasing the parties from mediation. However, this need not become an "interminable" process. We would hope that the Board, in deference to the plight of the railroad, and to the competing congressional policy favoring expedited regulatory approvals, would streamline its procedures to the extent possible and not keep the parties in mediation any longer than absolutely necessary. When progress is no longer forthcoming, we would hope that the Board would release the parties, forthwith. In sum, it would seem that this case need not require the "purposely long and drawn out" approach of more typical major railway disputes, that such delay runs counter to the public interest, and, in fact, that congressional intent might well require something much more expeditious.[33]

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33. *Id.* at 446-447 (footnotes, some citations omitted).

We adopt these views. Although the Eighth Circuit has recently reached a contrary conclusion, holding that the Staggers Act implicitly repeals the Railway Labor Act in this context,[34] we find the Third Circuit's reasoning more persuasive. Accordingly, we reverse the district court order denying a preliminary injunction and remand the case to that court to determine, in accordance with this opinion, whether Galveston Wharves has violated the Railway Labor Act and an injunction should issue. Although the remaining issues may be pure questions of law, we do not wish to pass on them without the benefit of the district court's findings and conclusions. The ultimate grant or denial of an injunction may, of course, be the subject of a future appeal, and we therefore express no opinion concerning its merits. We do, however, urge the district court, should it grant injunctive relief, to fashion it in such a manner as to minimize the burden on Galveston Wharves, if possible.

The judgment of the district court is REVERSED and REMANDED for further proceedings consistent with this opinion.

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34. *Burlington Northern Railroad Co. v. Transportation Union,* 848 F.2d 856 (8th Cir. 1988); *Railway Labor Executives Association v. Chicago and Northwestern Transportation Co.,* 848 F.2d 102 (8th Cir. 1988).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

C.A. G-87-359

RAILWAY LABOR EXECUTIVES'
ASSOCIATION, ET AL

v.

THE CITY OF GALVESTON, TEXAS acting by and through THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES, et al

FINDINGS OF FACT AND CONCLUSION OF LAW

In the case *sub judice,* the Railway Labor Executives' Association (RLEA) seeks to enjoin defendant Galveston Wharves from consummating a sale/lease agreement with Galveston Railway, Inc. (GRI). Under the sale/lease agreement, Galveston Wharves will lease its track, land thereunder and appurtenances to GRI. Remaining railway assets will be sold to GRI.

RLEA claims that such an agreement, without prior notice and negotiation with employees, is a violation of Section 6 of the Railway Labor Act (RLA), 45 U.S.C. § 156. The following findings of fact and conclusions of law are made pursuant to Federal Rule of Civil Procedure 52.

Findings of Fact

1. That the trackage at the wharf facility is a rail line and not a spur track or merely a switching track and the sale/lease of the railroad property requires authorization of the ICC.

2. That the ICC by its authorization approved the sale/lease transaction as applied for by the Galveston Wharves.

3. That the injunction sought in this case by the plaintiffs to forestall the consummation of the sale/lease would be contrary to the order of the ICC and constitute a collateral attack upon its approval of the vary same transaction.

Conclusions of Law

1. That where the ICC acting within the compass of its regulatory or supervisory power to approve a sale/lease of railway property, a district court may not, by applying the RLA, injunctively maintain the status quo as provided in Section 6 where the effect would inhibit a transaction approved by the ICC. *See Railway Labor Execs.' Ass'n. v. Staten Is. R.R.*, 792 F.2d 7, 11-12 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 927 (1987).

2. Hence, the petition for injunctive relief is DISMISSED under Fed. R. Civ. P. 12(b)(6) for failure to state a claim for injunctive relief upon which this Court may grant relief, and the temporary restraining order is DISSOLVED.

3. If any of the foregoing findings of fact constitute conclusions of law, they are adopted as such. If any of the foregoing conclusions of law constitute findings of fact, they are adopted as such. The Court reserves the right to file supplemental findings of fact and conclusions of law with regard to the foregoing ruling.

DONE at Galveston, Texas, this the 4th day of November, 1987.

/s/ HUGH GIBSON
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

C.A. G-87-359

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL

v.

THE CITY OF GALVESTON, TEXAS Acting By and Through THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES, ET AL

SUPPLEMENTAL FINDINGS OF FACT

The following supplemental findings are entered pursuant to the *per curiam* request made by the Fifth Circuit Court of Appeals on March 7, 1988.

Findings of Fact

1. The Galveston Wharves' rail facilities provide for the transportation of cargo between line haul rail carriers and sea-going vessels engaged in interstate and foreign commerce. The railroad operates five engines over approximately thirty-eight miles of track. The testimony shows, and the Court finds, that the performance of this function is an integral and vital part of the through movement of goods between line haul carriers and transporting vessels, which could not take place without the operation of the Galveston Wharves' rail facilities. (Transcript at pp. 136-

137; 139-140). That the railroad's operation might be deemed "switching" does not alter this fact.

2. The switching movement performed by the railroad in question here is not merely incidental to train movement. The railroad is engaged in switching freight cars between the lines of other railroads, and the wharves and port facilities. The service performed by the railroad in question is a "necessary link in the transportation under the through bill of lading." *Galveston Wharf Co. v. Galveston, Harrisburg & San Antonio Railway Co.*, 285 U.S. 127, 134 (1932).

3. The facts demonstrate that the traffic movements which occur over the trackage of the Wharf facility "are part of the actual transportation haul from shipper to consignee" and that the trackage is a "rail line" and not a spur track or an exempt switching track within the meaning of 49 U.S.C. § 10907. *New Orleans Terminal Company v. Spencer*, 366 F.2d 160, 165-66 (5th Cir. 1966).

DONE at Galveston, Texas, this the 15th day of April, 1988.

/s/ HUGH GIBSON
United States District Judge

APPENDIX D

STATUTES RELIED UPON

Railway Labor Act, 45 U.S.C. § 151 *et seq.*

Section 6, 45 U.S.C. Section 156

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

(May 20, 1926, c. 347, Title I, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197; redesignated Apr. 10, 1936, c. 166, 49 Stat. 1189.)

Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*

49 U.S.C. § 10505

§ 10505. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

(Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1361; Pub. L. 96-448, Title II, § 213, Oct. 14, 1980, 94 Stat. 1912.)

49 U.S.C. § 10901

§ 10901. Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Commission shall—

(1) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of the railroad line;

(2) send an accurate and understandable summary of the application to a newspaper of general circulation in each area that would be affected by the construction or operation of the railroad line;

(3) have a copy of the summary published in the Federal Register;

(4) take other reasonable and effective steps to publicize the application; and

(5) indicate in each transmission and publication that each intrested person is entitled to recommend to the Commission that it approve, deny, or take other action concerning the application.

(c)(1) If the Commission—

(A) finds public convenience and necessity, it may—

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions the Commission finds necessary in the public interest; or

(B) fails to find public convenience and necessity, it may deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the construction or acquisition (or both) and operation approved by the Commission.

(d)(1) Where a rail carrier has been issued a certificate of public convenience and necessity by the Commission authorizing the construction or extension of a railroad line, no other rail carrier may block such construction or extension by refusing to permit the carrier to cross its property if (A) the construction does not unreasonably interfere with the operation of the crossed line, (B) the operation does not materially interfere with the opera-

tion of the crossed line, and (C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the carriers are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Commission for determination.

(e) The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title.

(Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1402; Pub. L. 96-448, Title II, § 221, Oct. 14, 1980, 94 Stat. 1928.)

APPENDIX E

Interstate Commerce Commission Regulations,
Part 1150—Subpart D—Exempt Transactions

Subpart D—Exempt Transactions

Source 51 FR 2504, Jan. 17, 1986, unless otherwise noted.

§ 1150.31 Scope of exemption.

(a) Except as indicated below, this exemption applies to all acquisitions and operations under section 10901 (*See* 1150.1, *supra*). This exemption also includes:

(1) Acquisition by a noncarrier of rail property that would be operated by a third party;

(2) Operation by a new carrier of rail property acquired by a third party;

(3) A change in operators on the line; and

(4) Acquisition of incidental trackage rights. Incidental trackage rights include the grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party that occur at the time of the exempt acquisition or operation. This exemption does not apply when a class I railroad abandons a line and another class I railroad then acquires the line in a proposal that would result in a major market extension as defined at 49 CFR 1180.3(c).

(b) Other exemptions that may be relevant to a proposal under this subpart are the exemption for control at 49 CFR 1180.2(d)(1) and (2), and the from securities regulation at 49 CFR Part 1175.

§ 1150.32 Procedures and relevant dates.

(a) To qualify for this exemption, applicant must file a verified notice providing details about the transaction, and a brief caption summary, conforming to the format in § 1150.34, for publication in the FEDERAL REGISTER.

(b) The exemption will be effective 7 days after the notice is filed. The Commission, through the Director of the Office of Proceedings, will publish a notice in the FEDERAL REGISTER within 30 days of the filing. A change in operators would follow the provisions at 49 CFR 1150.34, and notice must be given to shippers.

(c) If the notice contains false or misleading information, the exemption is void *ab initio*. A petition to revoke under 49 U.S.C. 10505(d) does not automatically stay the exemption.

§ 1150.33 Information to be contained in notice.

(a) The full name and address of the applicant;

(b) The name, address, and telephone number of the representative of the applicant who should receive correspondence;

(c) A statement that an agreement has been reached or details about when an agreement will be reached;

(d) The operator of the property;

(e) A brief summary of the proposed transaction, including:

(1) The name and address of the railroad transferring the subject property,

(2) The proposed time schedule for consummation of the transaction,

(3) The mile-posts of the subject property, including any branch lines, and

(4) The total route miles being acquired;

(f) A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States; and

(g) A certificate that applicant has complied with the notice requirements of 49 CFR 1105.11.

[51 FR 2504, Jan. 17, 1986, as amended at 51 FR 25207, July 11, 1986]

§ 1150.34 Caption summary.

The caption summary must be in the following form. The information symbolized by numbers is identified in the key below:

INTERSTATE COMMERCE COMMISSION

Notice of Exemption

Finance Docket No.

(1)—Exemption (2)-(3)

(1) Has filed a notice of exemption to (2) (3)'s line between (4). Comments must be filed with the Commission and served on (5). (6).

Key to symbols:

(1) Name of entity acquiring or operating the line, or both.

(2) The type of transaction, *e.g.*, to acquire, operate, or both.

(3) The transferor.

(4) Describe the line.

(5) Petitioners representative, address, and telephone number.

(6) Cross reference to other class exemptions being used.

The notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION NO. G-87-359

RAILWAY LABOR EXECUTIVES' ASSOCIATION
400 First Street, N.W.
Washington, D.C. 20001

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYES
12050 Woodward Avenue
Detroit, Michigan 48203

BROTHERHOOD RAILWAY CARMEN,
DIVISION OF TCU
4929 Main Street
Kansas City, Missouri 64112

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS
10400 W. Higgins Road, Suite 720
Rosemont, Illinois 60018

TRANSPORTATION COMMUNICATIONS UNION
3 Research Place
Rockville, Maryland 20850

UNITED TRANSPORTATION UNION,
YARDMASTERS DEPARTMENT
14600 Detroit Avenue
Cleveland, Ohio 44107

and

UNITED TRANSPORTATION UNION
14600 Detroit Avenue
Cleveland, Ohio 44107
Plaintiffs

v.

THE CITY OF GALVESTON, TEXAS acting by and through THE BOARD OF TRUSTEE OF THE GALVESTON WHARVES
P.O. Box 328
123-25th Street
Galveston, Texas 77553

and

GALVESTON RAILWAY, INC.
2506 South Park Avenue
Dothan, Alabama 36301
Defendants

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, for their complaint against the defendants allege as follows:

Jurisdiction and Venue

1. This is an action to enforce the mandatory notice, negotiation and status quo requirements of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

2. The court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337, 2201 and 2202. The defendants do business in Galveston County, Texas, and venue is proper in this district and division pursuant to 28 U.S.C. §§ 124(b) and 1391(c).

The Parties

3. The Railway Labor Executives' Association ("RLEA") is an unincorporated association of the chief executive officers of 19 labor organizations which collectively represent most of the organized rail employees

in the United States. (A list of RLEA's member organizations is attached as an exhibit.)

4. RLEA's member organizations include the Brotherhood of Maintenance of Way Employes ("BMWE"); the Brotherhood Railway Carmen, Division of TCU ("BRC"); the International Brotherhood of Electrical Workers ("IBEW"); the Transportation Communications Union ("TCU"); the United Transportation Union, Yardmasters Department ("Yardmasters"); and the United Transportation Union ("UTU"). These labor organizations are the duly designated representatives of various crafts and classes of employees of Galveston Wharves. The organizations represent the employees with respect to their rates of pay, rules, and working conditions and are "representatives" of the employees within the meaning of the Railway Labor Act, 45 U.S.C. § 151 Sixth.

5. The City of Galveston, Texas is a home rule city, and The Port of Galveston, located at the entrance to Galveston Bay, is owned by the city. The Port, officially known as Galveston Wharves, is a separate utility consisting of all city-owned wharves and terminal facilities.

6. Galveston Wharves owns and operates a terminal railroad which provides rail car switching services at the Port for line-haul railroads under tariffs on file with the Interstate Commerce Commission. The terminal railroad operates five switch engines over approximately 38 miles of track and employs 85 employees. The railroad serves as agent for line-haul railroads, and its switching charges are absorbed by the line-haul carriers. As a terminal railroad, Galveston Wharves is a "carrier" within the

meaning of the Railway Labor Act, 45 U.S.C. § 151 First.

7. Pursuant to Galveston city's charter, Galveston Wharves is managed and controlled by the Board of Trustees of the Galveston Wharves:

> The Galveston Wharves, and the income and revenue therefrom, shall be fully managed, controlled, maintained and operated by a Board of Trustees . . .
>
> * * *
>
> The Board of Trustees shall have those powers which are necessary or proper to the discharge of their responsibilities . . .

The Board is composed of seven members. One member of the Board is an ex-officio representative of the City Council and is elected by the Council from its own membership. The remaining members of the Board are appointed by the City Council.

8. Galveston Railway, Inc. ("GRI") is a newly formed Texas corporation with its principal offices in Dothan, Alabama. GRI is authorized to do business as a common carrier by railroad in the State of Texas.

Statement of Claim For Relief

9. Under Section 2 First of the Railway Labor Act, a carrier has the duty to exert every reasonable effort to maintain agreements concerning the rates of pay, rules, and working conditions and to settle all disputes arising out of such agreements in order to avoid any interruption of commerce:

> It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152 First.

10. Section 2 Seventh of the Railway Labor Act provides that no carrier may change the rates of pay, rules, or working conditions of its employees except in the manner prescribed in Section 6 of the Act:

> No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of this Act.

45 U.S.C. § 152 Seventh.

11. Section 6 of the Act requires at least 30 days' notice (a "Section 6 notice") of newly proposed contract terms or contract changes and requires conferences between the parties concerning the proposed changes. Failing agreement, either party may request mediation from the National Mediation Board ("NMB"). If the NMB decides after mediation that the parties have reached an impasse, it proffers arbitration. If both parties do not agree to arbitration, the Act imposes a 30-day "cooling-off" period after which the parties may resort to economic self help. The union may strike, and the carrier may change the terms and conditions of employment. How-

ever, neither party many unilaterally alter the status quo until the cooling-off period has expired.

12. Section 6 provides:

> *Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions,* and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice. In every case where such notice of conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, *rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.*

45 U.S.C. § 156 (emphasis added).

13. Galveston Wharves and each of the labor organizations representing the various crafts and classes of railroad workers at the Port have entered into collective bargaining agreements which govern the employees' rates of pay, rules and working conditions. Galveston Wharves and the organizations, except plaintiff IBEW, have also entered into agreements (commonly known as "standby agreements") which provide that the parties are bound by recently negotiated National Agreements fixing the employees' general level of compensation. The National

Agreements remain in effect until June 30, 1988 and bar the parties from serving Section 6 notices proposing changes in existing agreements until April 1, 1988.

14. On September 29, 1987, notwithstanding the mandatory requirements of the Railway Labor Act and the express provisions of existing agreements with the organizations, Galveston Wharves issued an ultimatium to the organizations that it would lease its rail facilities to GRI unless the organizations agreed to accept a 26.4% reduction in existing wages and benefits.

15. On October 20, 1987, following the organizations' refusal to make a 26.4% wage concession, the Board of Trustees and GRI entered into a lease agreement which provides for the lease of the rail facilities to GRI. Under the terms of the lease agreement, the transfer of possession and control of the facilities will take place on October 28, 1987.

16. Although Galveston Wharves is obligated to maintain the employees' rates of pay, rules, and working conditions until the mandatory notice, negotiation, and status quo requirements of the Railway Labor Act have been exhausted, it has unilaterally changed established rates of pay, rules, and working conditions by leasing its rail facilities to GRI and by abrogating existing agreements with the organizations. This unilateral change in established rates of pay, rules and working conditions violates Section 2 First, Section 2 Seventh, and Section 6 of the Railway Labor Act 45 U.S.C. §§ 152 First, Seventh, 156.

RELIEF REQUESTED

WHEREFORE, plaintiffs request that this Court enter a judgment granting it the following relief:

1. a declaratory judgment that Galveston Wharves has violated Section 2 First, Section 2 Seventh and Section 6 of the Railway Labor Act, 45 U.S.C. §§ 152 First, Seventh, 156, by leasing its rail facilities to GRI and by abrogating existing agreements with the organizations;

2. preliminary and permanent injunctive relief enjoining defendants, their officers, agents, employees, and all persons acting by, through, for, or on their behalf from violating the mandatory notice, negotiation and status quo requirements of the Railway Labor Act and directing those parties to restore the status quo pending exhaustion of the major dispute resolution procedures of the Act;

3. an order requiring Galveston Wharves to make whole all employees who were adversely affected by its refusal to comply with its obligations under Section 2 First, Seventh and Section 6 of the Railway Labor Act, 45 U.S.C. § 152 First, Seventh, 156; and

4. such other relief as this Court may deem to be just and proper, including attorneys' fees and costs.

Respectfully submitted,

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Date: October 22, 1987

RLEA MEMBER LIST

American Railway and Airway Supervisors Association, Division of TCU
American Train Dispatchers Association
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railway Carmen, Division of TCU
Hotel & Restaurant Employees & Bartenders International Union
International Association of Machinists and Aerospace Workers
International Brotherhood of Boilermakers and Blacksmith
International Brotherhood of Electrical Workers
International Brotherhood of Firemen & Oilers
International Longshoremen's Association
National Marine Engineers Beneficial Association
Sheet Metal Workers' International Association
Seafarers International Union of North America
Transportation Communications Union
United Transportation Union - Yardmasters Department
United Transportation Union

Supreme Court, U.S.
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No. 88-517

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF GALVESTON, TEXAS, AND
GALVESTON RAILWAY, INC.,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENTS IN RESPONSE TO PETITION

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RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENTS IN RESPONSE TO PETITION

On September 26, 1988, petitioners City of Galveston, Texas (acting by and through the Board of Trustees of the Galveston Wharves) and Galveston Railway, Inc. filed a petition with this Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the decision of that Court in *Railway Labor Executives' Association v. City of Galveston, Texas,* 849 F.2d 145. This brief is respectfully submitted by respondent Railway Labor Executives' Association [hereinafter, "RELA"] and six of its member organizations which are respondents in this case.[1]

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[1] Those individual RLEA member organizations are: Brotherhood of Maintenance of Way Employes; Brotherhood Railway Car-

Respondents agree with petitioners that the issue raised by this case is important to the entire rail industry and should be resolved by this Court. However, respondents submit that this case should not be used as a vehicle by which to resolve this issue. Rather, respondents suggest that this Court resolve the issue raised in this case by granting the writs in No. 87-1911, *RLEA v. Guilford Transportation Industries, Inc.*, and No. 87-2049, *RLEA v. Chicago & North Western Transportation Co.*, and hold this petition in abeyance until those cases are resolved.

STATUTES INVOLVED

Respondents submit that this case involves Sections 2 First and 2 Seventh of the Railway Labor Act, 45 U.S.C. §§ 152 First and 152 Seventh,[2] in addition to those provisions cited by petitioners.

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men (Division of TCU); International Brotherhood of Electrical Workers; Railroad Yardmasters of America (Division of UTU); Transportation • Communications Union; and United Transportation Union.

[2] Section 2 First of the Railway Labor Act, 45 U.S.C. § 152 First, provides as follows:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 2 Seventh, 45 U.S.C. § 152 Seventh, provides as follows:

> No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

ARGUMENT

This case, according to petitioners, presents only one question—namely, whether rail labor's suit to enforce the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, constitutes "an impermissible collateral attack" on the order of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] "approving" the sale and lease of railroad property to petitioner Galveston Railway. Petitioners assert that this Court should review that question, which they argue is important (Pet. at 10 n.7), because it has been decided by the Fifth Circuit in a manner which conflicts with applicable decisions by this Court (in particular, *Venner v. Michigan Central R.R.*, 271 U.S. 127 (1926)) and with decisions by both the Second and Eighth Circuits in *Burlington Northern R.R. v. UTU*, 848 F.2d 856 (8th Cir. 1988), *pet. for cert. pending, ICC v. UTU*, Sup. Ct. No. 88-711; *RLEA v. Chicago & North Western Transportation Co.*, 848 F.2d 102 (8th Cir. 1988), *pet. for cert. pending*, Sup. Ct. No. 87-2049; and *RLEA v. Staten Island R.R.*, 792 F.2d 7 (2d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987).

While respondents disagree with petitioners' contention that there is a conflict on the collateral attack issue between the Fifth Circuit's decision in this case and decisions by this Court and by the Eighth and Second Circuit upon which petitioners rely,[3] respondents submit that there is a conflict on this issue between this case and the decisions by the First Circuit in *RLEA v. Guilford Transportation Industries, Inc.*, 1st Cir. No. 87-1774, decided

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[3] For example, the Eighth Circuit did not address the collateral attack issue in *Burlington Northern* or *Chicago & North Western*, but, as relevant here, concluded that the Railway Labor Act's major dispute resolution procedures were superseded by the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* Rail labor respectfully submits that this conflict of laws issue is separate from, although related to, the collateral attack issue and needs to be resolved separately, albeit concurrently with the collateral attack issue.

January 20, 1988 (unpublished), *pet. for cert. pending*, Sup. Ct. No. 87-1911, and in *BLE v. Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986). However, as respondent RLEA pointed out in its petition for a writ of certiorari in *Guilford Transportation Industries*, rail labor submits that the *Guilford* case presents the best vehicle to decide the collateral attack issue, as well as the conflict of laws issue, for several reasons.

According to petitioners, the collateral attack on an ICC order occurs because the Commission's class exemption in *Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985), *aff'd sub nom. Illinois Commerce Comm. v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (table), as well as the exemption exercised in this case, would be nullified if a court enforced the Railway Labor Act's notice, bargaining and status quo obligations. The validity of that assertion is presented by RLEA's first question in *Guilford*, although the class exemption and regulatory provision from which the Guilford carriers' were exempted are different than those involved here. However, it is that difference in regulatory provisions between this case and *Guilford* that makes *Guilford* an attractive test case.

In *Guilford*, the railroads exercised a class exemption which the ICC had given to all affiliated railroads to consummate intracorporate family financial transactions within the scope of 49 U.S.C. § 11343(a),[4] whereas the regulatory provision from which petitioner Galveston Railway was exempted in this case is 49 U.S.C. § 10901. The relevant distinction between the two regulatory provisions is that Section 11347, when read in conjunction with 49 U.S.C. § 10505(g)(2), requires the ICC to im-

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[4] That class exemption was granted in *Ex Parte No. 282 (Sub-No. 3), Railroad Consolidation Procedures*, 363 I.C.C. 200 (1980).

pose employee protective conditions upon all approvals of Section 11343(a) transactions, or their exemptions from regulation, whereas Section 10901 leaves that matter (*i.e.*, whether or not to impose employee protective provisions) to the discretion of the Commission. In *Guilford*, the ICC imposed provisions to protect employee interests, while in this case, that agency has not imposed employee protective conditions.

This distinction is highly relevant to the decision that this Court must make as to which of the pending petitions raising the various issues arising from the conflict between the Railway Labor Act and the Interstate Commerce Act should be granted. If this Court were to decide the collateral attack issue in a case in which the ICC had not imposed employee protective conditions, such as this case, and if it were concluded that a collateral attack was not involved, that would then leave unresolved the question of whether the imposition of employee protection by the ICC would change that conclusion. According to the First Circuit, the imposition of employee protective conditions which "authorize the carrier to proceed with the transaction before an implementing agreement has been reached" meant that an order enforcing the Railway Labor Act's status quo obligation would be, "in essence, a collateral attack upon the ICC's order." *BLE v. Boston & Maine Corp.*, *supra*, 788 F.2d at 801. *See also*, *Burlington Northern R.R. v. UTU*, *supra*, 848 F.2d at 862-63.

Since *Guilford* presents a case in which employee protective provisions were imposed that, according to the Guilford carriers, authorized them to effectuate their leases *before* agreements were reached, *Guilford* presents both the employee protective aspect of the collateral attack issue and the general collateral attack question. *Galveston Wharves*, however, presents only the general collateral attack issue. Consequently, respondents respectfully submit, Guilford is the more appropriate vehicle to review

the entire collateral attack question than is the *Galveston Wharves* case.

On the other hand, if this Court were to conclude that the employee protection aspect of the *Guilford* case made RLEA's suit a collateral attack on the ICC exemption orders, or if this Court did not reach that issue because of its resolution of any of the other questions presented in that case, this Court could still address the collateral attack issue without granting the petition in this case. This is so, respondents submit, because the collateral attack issue is presented by the second question in No. 87-2049, *RLEA v. Chicago & North Western Transportation Co.* Respondent Chicago & North Western Transportation Company raised the collateral attack issue throughout the litigation in the lower courts in that case, and the district court's decision rejecting RLEA's efforts to enforce the Railway Labor Act was premised upon its conclusion that enforcement of the labor Act would be at "odds with the ICC" exemption order in that case. Petition in 87-2049 at 7a. Thus, the issue raised in this case is also raised in No. 87-2049, and will have to be reached if this Court agrees with RLEA on the first issue and concludes that the Interstate Commerce Act does not supersede the Railway Labor Act.

In sum, respondents respectfully submit that the petitions before this Court in Nos. 87-1911 and 87-2049 present the best vehicles to resolve the collateral attack issue presented by this petition. Therefore, respondents suggest that this Court hold this case in abeyance until the decisions in Nos. 87-1911 and 87-2049 are reviewed.[5]

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[5] As RLEA pointed out in its petition's in No. 87-2049 and No. 88-464, *RLEA v. Chicago & Northwestern Transportation Co.*, the current litigation concerning the relationship between the ICC's powers over rail transportation and rail labor's bargaining rights also involves a question as to whether federal courts or boards of adjustment established under Section 3 of the Railway Labor Act, 45 U.S.C. § 153, have jurisdiction to determine what actual, ob-

CONCLUSION

For the reasons set forth herein, RLEA respectfully submits that this Court should hold this petition in abeyance until a decision is rendered in Sup. Ct. Nos. 87-2049 and 87-1911.

Respectfully submitted,

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jective working conditions must be maintained during the labor statute's bargaining processes when a carrier asserts that it has a contractual right to sell and abolish jobs. That issue is presented by the petition in No. 88-464; rail labor maintains that it should be considered by this Court along with the petitions in Nos. 87-2049 and 87-1911.